91-1985

Supreme Court, U.S.
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No. _____

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

KARL BRICELAND McCURDY,
*Petitioner,*
v.
THE UNITED STATES OF AMERICA,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether the search of the storage facility and seizure of drugs was in violation of the fourth amendment to the United States Constitution because the magistrate issuing the warrant was mislead by information in the affidavit that the affiant knew or should have known was false except for his reckless disregard of the truth.

2. Whether the search of the storage facility and seizure of drugs was in violation of the fourth amendment to the United States Constitution because the affidavit was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.

## LIST OF ALL PARTIES

Petitioner/Appellant/Defendant

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- Douglas C. McNabb
  Attorney for Petitioner
- Kerry P. Fitzgerald
  Attorney for Appellant
- Kenneth E. Blassingame
  Attorney for Appellant/Defendant

Respondent/Appellee/Plaintiff

- United States of America
- Thomas M. Melsheimer
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  Attorney for Appellee/Plaintiff

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NO. _____

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

KARL BRICELAND MCCURDY,
*Petitioner,*
v.
THE UNITED STATES OF AMERICA,
*Respondent.*

**Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## PETITION FOR WRIT OF CERTIORARI

Petitioner, Karl Briceland McCurdy, respectfully prays that a Writ of Certiorari issue to review and reverse the Judgment of the United States Court of Appeals for the Fifth Circuit.

## OPINION BELOW

The Opinion and Decision of The United States Court of Appeals for the Fifth Circuit is enclosed and printed as Appendix A.

## JURISDICTION

The trial court's judgment was entered on March 8, 1991. The Fifth Circuit rendered its opinion on March 9, 1992. This petition was timely filed within 90 days of the Fifth Circuit's decision. This Court's jurisdiction is invoked under 28 U.S.C.A. § 1254 (West Supp. 1991).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

| | |
|---|---|
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## STATEMENT OF THE CASE

On June 5, 1990, officer James E. Wright ("Wright") executed a search warrant at a Lock and Key mini-storage facility ("the mini storage") in Dallas, Texas, which resulted in the confiscation of approximately 500 pounds of phenylacetic acid; assorted glassware and paraphernalia used in the manufacture of controlled substances, including triple neck flasks; and approximately $100,000 in cash. The warrant was issued after Wright submitted an affidavit which stated that he had probable cause based on confidential information that there was a strong odor consistent with that of methamphetamine and/or amphetamine coming from one of the units of the mini-storage. Wright attested that a trained narcotics detection dog gave positive alerts at units

numbered 438 and 439. He added that he also could smell the odor from inside these units and that he was familiar with the smell of methamphetamine and amphetamine.

Petitioner, the Lessee of the units containing the drugs, was subsequently indicted for possessing a listed chemical with intent to manufacture a controlled substance in violation of 21 U.S.C.A. § 841(d)(1) (West Supp. 1991). A superseding indictment charged Petitioner with possession of a listed chemical with the intent to distribute in violation of 21 U.S.C.A. § 841(a)(1) (West Supp. 1991), possession of a chemical used to manufacture a controlled substance in violation of 21 U.S.C.A. § 841(d)(1) (West Supp. 1991), and with possession of a three-neck round bottom flask with intent to manufacture a controlled substance in violation of 21 U.S.C.A. § 843(a)(6) (West Supp. 1991).

Petitioner moved to quash the indictments against him and to suppress the evidence from the search of the mini-storage. At an evidentiary hearing, Wright testified that he went to the mini-storage complex on June 4, 1990, after he received a telephone call from another member of the police department. The manager of the mini-storage had called the police to say that a strong odor was coming from one of the units. According to Wright, the manager asked that the police utilize a narcotics detection dog to determine if narcotics were involved. When Wright arrived at the mini-storage, he asked the managers, Art and Barbara Tapp, if he could take his dog inside the complex and let the dog sniff the units. During the conversation, Mrs. Tapp said that she had detected what she described as "meth" or a chemical odor coming from units 438 and 439.

Wright started the dog several units from those at issue. She gave a positive alert to units 438 and 439. Wright testified that he had used the dog for over a thousand

searches since April, 1989 and that she had been very reliable. Wright testified that he also smelled the odor. Wright stated that he asked the Tapps for the papers on the person who rented the units. Mrs. Tapp showed him a copy of the lease agreement and information. The next day, June 5, 1990, he obtained and executed the search warrant.

Petitioner points to the deposition testimony of Barbara Tapp in which she stated that she was not a confidential informant, had never given the Dallas police information that resulted in arrest or conviction, and that she did not know what phenylacetic acid smelled like. She stated that she did not know from which units the odor was coming, and denied that she saw a dog. Tapp also testified that she did not know whether there was a chemical in the mini-storage unit.

The district court denied Petitioner's motion to suppress the evidence from the search of the mini-storage. *See Appendix 11a.* Petitioner pled guilty to one count of possession of a listed chemical with intent to manufacture, but reserved his right to appeal the denial of his motion to suppress. The court sentenced him to the statutory maximum 120 months imprisonment and a $4,000 fine.

Petitioner appealed to the United States Court of Appeals for the Fifth Circuit and prayed for reversal and acquittal. On March 9, 1992, the Fifth Circuit affirmed, *per curiam*, the conviction and sentence. *See Appendix 1a.*

From his conviction and sentence and the affirmation by the Fifth Circuit, Petitioner prays for writ of certiorari.

## REASONS FOR GRANTING THE WRIT

### QUESTION ONE

WHETHER THE SEARCH OF THE STORAGE FACILITY AND SEIZURE OF DRUGS WAS IN VIOLATION OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION BECAUSE THE MAGISTRATE ISSUING THE WARRANT WAS MISLEAD BY INFORMATION IN THE AFFIDAVIT THAT THE AFFIANT KNEW OR SHOULD HAVE KNOWN WAS FALSE EXCEPT FOR HIS RECKLESS DISREGARD OF THE TRUTH.

The Affidavit for Search and Arrest Warrant recites that Officer Wright received information on June 4, 1990 from a reliable confidential informant that there was a strong odor consistent with Methamphetamine and Amphetamine coming from units 438 and 439. Subsequently, the officer walked his canine by the units and other units in the area and the dog showed a positive alert. In addition, the officer smelled Methamphetamine and Amphetamine, based upon his prior experience. The canine had been trained as to odors of controlled substances. The officer believed that the units contained a controlled substance, Methamphetamine or Amphetamine, because of the canine's positive alert and because he personally smelled the odors of Amphetamine and Methamphetamine himself.

At the Motion to Suppress hearing, the officer testified that he received information from a fellow police officer that the manager, Mrs. Tapp, called the police station with regard to odors at specific units and requested canines; and that he personally talked to Mrs. Tapp who related that

she smelled the strong odor of Methamphetamine and Amphetamine.

However, it is likewise clear from the hearing that Mrs. Tapp denied ever being the confidential informant in this case and denied ever telling the officer that she personally smelled anything other than a foul odor emanating from the units. She did not know the odor of a controlled substance. In further support, the deposition of Mrs. Tapp is contained in the trial record and supports Petitioner's contention.

The Fourth Amendment to the United States Constitution provides as follows:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person and things to be seized.

U.S. Const. amend. IV.

The Fourth Amendment essentially prohibits general searches and seizures and requires that a search warrant describe with particularity the items to be seized. *Anderson v. Maryland*, 427 U.S. 463, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976).

The Supreme Court's decision in *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978) outlines the consequences which flow from a misrepresentation in a search warrant application. The Court

held that if a false statement knowingly and intentionally or with reckless disregard for the truth was included by an officer in the warrant affidavit, and if the allegedly false statement was necessary to the finding of probable cause, and if the affidavit's false material is set to one side, and if the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

## QUESTION TWO

WHETHER THE SEARCH OF THE STORAGE FACILITY AND SEIZURE OF DRUGS WAS IN VIOLATION OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION BECAUSE THE AFFIDAVIT WAS SO LACKING IN INDICIA OF PROBABLE CAUSE AS TO RENDER OFFICIAL BELIEF IN ITS EXISTENCE ENTIRELY UNREASONABLE.

Petitioner submits that the balance of the affidavit was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. In *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984) and *Massachusetts v. Sheppard*, 468 U.S. 981, 104 S.Ct. 3424, 82 L.Ed.2d 737 (1984), the Supreme Court set forth an exception to the exclusionary rule based on the good faith actions of the officers. Notwithstanding this good faith exception, the Court emphasized that there were still four situations in which suppression would be proper, two of which apply in this case.

First, suppression is proper if the Magistrate was misled by information the affiant knew was false or would have known was false except for reckless disregard of the truth. Second, suppression is proper if the affidavit is so lacking in indicia of reliability that a finding of probable cause based thereon is unreasonable.

In reviewing a District Court's ruling on a Motion to Suppress based on testimony at the suppression hearing, the Court of Appeals must accept the District Court's factual findings unless they are clearly erroneous or are influenced by an incorrect view of the law. *United States v. Maldonado*, 735 F.2d 809, 814 (5th Cir. 1984). Additionally, the Court of Appeals must view the evidence in the light most favorable to the party that prevailed in the District Court.

Petitioner acknowledges that the Fifth Circuit has addressed the Fourth Amendment status of a sniff by a well trained narcotic detection dog on a number of separate occasions and in general has held that a dog sniff is not a search. *United States v. Goldstein*, 635 F.2d 356 (5th Cir. 1981); *United States v. Place*, 462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983); *United States v. Lovell*, 849 F.2d 910 (5th Cir. 1988).

In *Lovell, supra* the Court, relying on *Place, supra* emphasized that the dog sniff disclosed only the presence or absence of narcotics, a contraband item. The Court noted that no other investigative procedure was so limited both in the manner in which the information was obtained and in the content of the information revealed by the procedure.

Generally, it will not be sufficient to show that dogs are reasonably reliable in indicating the presence or recent presence of contraband. If the reaction is to justify a search,

it must give rise to reasonable suspicion that the search will produce something i.e., reasonable suspicion that contraband is currently present. *Horton v. Goose Creek Independent School District*, 690 F.2d 470 (5th Cir. 1982); *United States v. Petty*, 601 F.2d 883 (5th Cir. 1979).

In *Leon*, the Court held that evidence obtained by law enforcement officials acting in objectively reasonable good faith reliance upon a search warrant is admissible in the prosecution's case in chief, even though the affidavit on which the warrant was based was insufficient to establish probable cause. Issuance of a warrant by a Magistrate normally suffices to establish good faith on the part of law enforcement officials who conduct a search pursuant to the warrant, unless the warrant is based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.

The determination of good faith will ordinarily depend on an examination by the Court of the Affidavit. Two governing principles apply in assessing whether the affidavit bore indicia of probable cause. First, the proof must be of facts so closely related to the time of the issuance of the warrant as to justify a finding of probable cause at that time. *United States v. Minis*, 666 F.2d 134, 140 (5th Cir. 1982). Second, the affidavit should be construed in a common sense and realistic manner with conclusions based upon the "laminated total" of available facts. *United States v. Fooladi*, 702 F.2d 180 (5th Cir. 1983).

Petitioner submits that the determination of whether probable cause exists must be made by the Court independently, as the deference usually accorded to the Magistrate's finding of probable cause is not appropriate when the Magistrate relied in part on improper information, i.e., that the owner of the storage units conveyed certain

information to the police when in fact this was not the case. *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969); *United States v. Travisano*, 724 F.2d 341 (2d Cir. 1983). Petitioner further submits that this Court cannot find that the totality of the circumstances provided a sufficient basis for the issuance of the search warrant in this case.

The Petitioner further submits that in this case there is ample evidence that while the dog alerted to the storage units and that the officer himself smelled the odor in question, the officer admitted on cross-examination that phenylacetic acid was the dominant odor involved and that it was lawful to possess that acid with a permit; and that possession of that acid was as consistent with lawful as with unlawful activity; and that the officer could not distinguish this type acid dominant odor from an odor of Methamphetamine or Amphetamine.

In view of the state of the record in this case and the facts to which the officer admitted on cross-examination, it is respectfully submitted that whatever odor was detected was as consistent with legal activity as illegal activity and that therefore the officer's actions in penetrating and conducting the search and seizure in this case of the units in question was not valid under the good faith doctrine. *See, United States v. De Leon-Reyna*, 898 F.2d 486 (5th Cir. 1990).

Petitioner therefore respectfully submits that the search and seizure conducted in this case was illegal in violation of the Fourth Amendment to the United States Constitution and that the District Court committed reversible error in failing to so find. Petitioner respectfully submits that this Court should hold the fruits of the search and

seizure inadmissible, and should therefore reverse the judgment of conviction and remand the case to the District Court for further proceedings.

## CONCLUSION AND PRAYER

The United States Court of Appeals for the Fifth Circuit has committed a significant error in concluding that the search of the storage facility and seizure of drugs was not in violation of the fourth amendment to the United States Constitution. The Fifth Circuit's refusal to reverse Petitioner's conviction will cause serious repercussions as a result of expanded discretionary actions exercised by the law enforcement community. The federal questions presented are of importance to the jurisprudence of the nation.

For these reasons, the Petitioner KARL BRICELAND MCCURDY, respectfully prays that this Court issue a Writ of Certiorari to review the Opinion of the United States Court of Appeals for the Fifth Circuit, and for such other and further relief to which he may be entitled.

Respectfully submitted,

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**APPENDIX A**

OPINION OF
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 91-1300
(Summary Calendar)

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UNITED STATES OF AMERICA,
Plaintiff-Appellee,

VERSUS

KARL BRICELAND McCURDY,
Defendant-Appellant.

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Appeal from the United States District Court
For the Northern District of Texas
(CR3-90-176-R)

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(March 9, 1992)

Before POLITZ, Chief Judge, KING and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Karl Briceland McCurdy ("McCurdy") pled guilty to a charge of possession of a chemical used to manufacture a controlled substance in violation of 21 U.S.C. § 841(d)(1). McCurdy alleges that the evidence used to indict him should be suppressed because the search by which the evidence was secured violated the Fourth Amendment because the affidavit upon which the warrant was based was lacking in indicia of probable cause, and because false statements were included in the warrant affidavit intentionally or with a reckless disregard for the truth. McCurdy also urges an incorrect application of the sentencing guidelines. Finding no error, we affirm.

I

On June 5, 1990, officer James E. Wright ("Wright") executed a search warrant at a Lock and key mini-storage facility ("the mini-storage") in Dallas, Texas, which resulted in the confiscation of approximately 500 pounds of phenylacetic acid; assorted glassware and paraphernalia used in the manufacture of controlled substances, including triple neck flasks; and approximately $100,000 in cash. The warrant was issued after Wright submitted an affidavit which stated that he had probable cause based on confidential information that there was a strong odor consistent with that of methamphetamine and/or amphetamine coming from one

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

of the units of at the mini-storage. Wright attested that a trained narcotics detection dog gave positive alerts at units numbered 438 and 439. He added that he also could smell the odor from inside these units and that he was familiar with the smell of methamphetamine and amphetamine.

McCurdy, the renter of the units containing the drugs, was subsequently indicted for possessing a listed chemical with intent to manufacture a controlled substance in violation of 21 U.S.C. § 841(d)(1). A superseding indictment charged McCurdy with possession of a listed chemical with the intent to distribute in violation of 21 U.S.C. § 841(a)(1), possession of a chemical used to manufacture a controlled substance in violation of 21 U.S.C. § 841(d)(1), and with possession of a three-neck round bottom flask with intent to manufacture a controlled substance in violation of 21 U.S.C. § 843(a)(6).

McCurdy moved to quash the indictments against him and to suppress the evidence from the search of the mini-storage. At an evidentiary hearing, Wright testified that he went to the mini-storage complex on June 4, 1990, after he received a telephone call from another member of the police department. The manager of the mini-storage had called the police to say that a strong odor was coming from one of the units. According to Wright, the manager asked that the police utilize a narcotics detection dog to determine if narcotics were involved. When Wright arrived at the mini-storage, he asked the managers, Art and Barbara Tapp, if he could take his dog inside the complex and let the dog sniff the units. During the conversation, Mrs. Tapp said that she had detected what she described as "meth" or a chemical odor coming from units 438 and 439.

Wright started the dog several units from those at issue. She gave a positive alert to units 438 and 439. Wright testified that he had used the dog for over a thousand searches since April, 1989 and that she had been very reliable. Wright testified that he also smelled the odor. Wright stated that he asked the Tapps for the papers on the person who rented the units. Mrs. Tapp showed him a copy of the lease agreement and information. The next day, June 5, 1990, he obtained and executed the search warrant.

McCurdy points to the deposition testimony of Barbara Tapp in which she stated that she had never given the Dallas police information that resulted in arrest or conviction, and that she did not know what phenylacetic acid smelled like. She stated that she did not know from which units the odor was coming, and denied that she saw a dog. Tapp also testified that she did not know whether there was a chemical in the mini-storage unit.

The district court denied McCurdy's motion to suppress the evidence from the search of the mini-storage. McCurdy pled guilty to one count of possession of a listed chemical with intent to manufacture, but reserved his right to appeal the denial of his motion to suppress. The court sentenced him to the statutory maximum 120 months imprisonment and a $4,000 fine. McCurdy filed a timely notice of appeal.

II

A

McCurdy appears to make two separate arguments in his first point of error. We find both to be without merit.

I

McCurdy argues that the search of the storage facility violated the Fourth Amendment because the magistrate who issued the warrant was misled by information in the affidavit that Wright knew or should have known was false, and that the affidavit was so lacking in indicia of probable cause so as to render official belief in its existence entirely unreasonable.

According to McCurdy, Wright included in his affidavit for the search and arrest warrant that he had a confidential informant, when in fact this alleged informant, Barbara Tapp, denied being such an informant. As we noted in *United States v. Craig*, 861 F.2d 818, 821 (5th Cir. 1988), in *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405 (1984), the Court stated that evidence obtained by law enforcement officials acting in objectively reasonable good-faith reliance upon a search warrant is admissible in the prosecution's case-in-chief, even though the affidavit on which the warrant was based was insufficient to establish probable cause. Issuance of a warrant by a magistrate normally suffices to establish good faith on the part of law enforcement officers who conduct a search pursuant to the warrant. *Id.* This good faith exception does not apply if: (1) the magistrate in issuing the warrant was misled by information in the affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth; (2) the issuing magistrate abandons his judicial role so that no reasonably well trained officer should rely on the warrant; (3) the warrant is based on an affidavit so lacking in indicia of probable cause that official belief in its existence is entirely unreasonable; or (4) the warrant is so facially deficient in failing to particularize the place to be searched and things to be seized, that the executing officers cannot reasonably presume it to be valid. *See Leon*, 468 U.S. at 922-24, 104 S.Ct. 3420-21 (citations omitted). Our

review of the objective reasonableness of an officer's reliance on a search warrant is a question of law reviewable de novo; the underlying facts upon which that determination is based is reviewed for clear error. *See United States v. Maggitt*, 778 F.2d 1029, 1035 (5th Cir. 1985), *cert. denied*, 476 U.S. 1184, 106 S.Ct. 2920 (1986).

McCurdy argues that the first and third exceptions to the good-faith exception to the exclusionary rule apply. We disagree. Regarding the first exception, there is no indication that the magistrate was misled by information in Wright's affidavit that Wright knew was false or would have known was false except for Wright's reckless disregard of the truth. Given the fact that the Tapps had called the police to report the suspicious odor coming from one of their rental storage units, described the smell as "meth," and showed rental information about the units to Wright, it was not incorrect to characterize Barbara Tapp as a confidential informant. In any event, this characterization, even if inaccurate, does not indicate a reckless disregard of the truth.

The third exception does not apply either. Wright, who gave the affidavit, explained that he was experienced and familiar with the controlled substances methamphetamine and amphetamine. In addition to detecting the odor of the controlled substances, a narcotics detection dog detected the controlled substances as did the Tapps in the first place. We believe that these circumstances provide sufficient "indicia of probable cause" such that official belief in its existence was not entirely unreasonable. Thus, McCurdy's arguments are without merit.

McCurdy appears to argue that based upon *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674 (1978) the evidence should have been suppressed. Under *Franks v. Delaware*,

> [W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury of reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

*Franks*, 438 U.S. at 155-56, 98 S.Ct. at 2676. The district court's findings that there was no demonstration of deliberate falsehood or reckless disregard for the truth is reviewed under the clearly erroneous standard. *See United States v. Castillo*, 866 F.2d 1071, 1078 (9th Cir. 1988) (citations omitted).

During the suppression hearing, Wright testified that he got his information regarding the controlled substances at the Lock and Key from another member of the police department, that he took his dog to the Lock and Key and that it alerted at units 438 and 439, and that he could also

smell the controlled substances. After hearing Wright's testimony, the district court did not suppress the evidence.

We find that the search warrant was not rendered invalid by any false or misleading statement in the affidavit. As the district court found, Wright appeared to be a very credible witness. Wright's characterization of Barbara Tapp as a confidential informant does not indicate he made false statements intentionally or with a reckless disregard for the truth. The district court's findings were not clearly erroneous.

B

McCurdy also asserts that the district court incorrectly calculated the cocaine equivalent of the illegal precursor chemical found in his storage units. The PSR computed the base offense level based on 480 pounds of phenylacetic acid which converts to approximately 219 kilograms of phenylacetic acid. The PSR concluded that a conservative yield of 60 percent from 219 kilograms of phenylacetic acid would be approximately 131.4 kilograms of phenylacetone (P2P). Using the Drug Equivalency Tables, 131.4 kilograms of P2P equals approximately 273.3 kilograms of cocaine. Additionally, the 170 grams of methamphetamine seized equals .85 kilograms of cocaine, and the 493 grams of P2P seized equals approximately 1.3 kilograms of cocaine, for a total of approximately 275 kilograms of cocaine.

The PSR assigned a base offense level of 38 pursuant to U.S.S.G. § 2D1.1(c)(3). The PSR subtracted two points for acceptance of responsibility and assigned a level one criminal history category. The PSR noted that the guideline range of imprisonment would be 188 to 235 months, but that the maximum statutory term of imprisonment was 120 months. U.S.S.G. § 5G1.1(a) provides that where the

statutorily authorized maximum sentence is less than the minimum guideline range, the statutorily authorized maximum sentence shall be the guideline sentence.

McCurdy first argues that one of the chemicals necessary to manufacture P2P was not seized and that if it were present, it would have a 15 percent yield, not a 60 percent yield as calculated by the PSR. Alternatively, McCurdy argues that phenylacetic acid should not be counted at all in calculating his base offense level because the chemical with which it had to be combined to manufacture cocaine was not seized. According to McCurdy, at most 2.15 kilograms of cocaine was seized, based on the 493 grams of P2P and the 170 grams of methamphetamine seized.

As to McCurdy's first argument, 15 percent of 219 kilograms of phenylacetic acid is 32.85 kilograms. Using the Drug Equivalency Tables, 32.85 kilograms of P2P equals to approximately 68.32 kilograms of cocaine; with the other additions for narcotics seized, this amount results in a total of approximately 70.47 kilograms of cocaine and results in a base offense level of 36. *See* U.S.S.G. § 2D1.1(c)(4). Reduced two points for acceptance of responsibility, the offense level is 34. With a level one criminal history category, the guideline range is 151 to 188 months. As with the level 36 category, because the minimum guideline sentence for a level 34 is greater than the statutory maximum, the statutory maximum is the sentence. *See* U.S.S.G. § 5G1.1.[1]

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1. In his brief, McCurdy also argues that a 30 percent yield figure is appropriate. Thirty percent of 219 kilograms is 65.7 kilograms. Using the Drug Equivalency Tables, 65.7 kilograms of P2P equals approximately 136.6 kilograms of cocaine. With the other additions for narcotics seized, this amount results in a total of approximately 138.7

McCurdy's second argument fails because he pled guilty to possessing a listed chemical, phenylacetic acid, with the *intent* to manufacture a controlled substance in violation of 21 U.S.C. § 841(d)(1). As the Government points out, the absence of key ingredients for the manufacture of cocaine is irrelevant because the crime is possession with intent to manufacture, to which he pled guilty. Thus, the court did not err when it sentenced him to the statutory maximum of ten years based on the PSR's computation of the drugs seized.

III

Accordingly, we AFFIRM.

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kilograms of cocaine, and results in a base offense level of 36. *See* U.S.S.G. § 2D1.1(c)(4). Reduced two points for acceptance of responsibility, the offense level is 34. With a level one criminal history category, the guidelines range is 151 to 188 months. This guidelines range is also greater than the statutory maximum of 120 months.

## APPENDIX B

DECISION OF
THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF TEXAS,
DALLAS DIVISION - MOTION TO SUPPRESS

COURT'S RULING
Pages 42-46

THE COURT: Okay. I will overrule the Defendant's Motion to Suppress. And I will also overrule the Defendant's Motion to Quash the Indictment.

Under repeated 5th Circuit cases the use of the dog to sniff was not a search. And there's no question about that. There's also no inconsistency between Mrs. Tapp and the officer with regard to the critical issue which is consent. There was no conflict in that regard. So taking the dog out wouldn't be a search, and then once the officer got there he did conduct a search. He did have probable cause, as he states in the affidavit.

Most of the argument by the Defendant is based on credibility of the officer. And having seen the officer testify, I'm convinced that he's a very credible witness. True, I didn't have an opportunity to see Mrs. Tapp, but I do have a very credible explanation from the officer about why she gave the answers that she did on her deposition. And that she denied giving any information because she didn't want to be anything other than a confidential informant. And it's obvious that the officer was trying to keep her confidential and no reason he couldn't do so.

As to the dog Taffy, it's obvious from the testimony of the officer, which I credit, that the dog was a well-trained dog. That's established by the training that was given before the city bought it, and, in fact, the city paid $3,000 for the dog would indicate that it's worth a lot more than one run of the mill dog. And then the experience of a couple of weeks that he had -- he, the officer, had with the the dog and with Drexler, the original trainer, would support the ability of the dog, as well as the experience which this officer had, he was the only one that worked with Taffy, and says that at least 90 percent of the cases that she reached a successful result. I do credit that testimony.

That would make both Taffy and the officer an expert in terms of training, and experience and ability. And I do credit his testimony that he knows the smell of at least the predominant chemical in amphetamine and methamphetamine.

I reject the argument based on this is a legal chemical, and that, therefore, destroys any good faith by the officer in relying on the warrant or any probable cause.

I might reach an entirely different result if I had an officer trying to search the manufacturing plant of Chanel No. 5, but that's not what I have. They're trying to search a warehouse and it's obvious that they did have probable cause to search.

Bottom line is the dog was right and the officer was right. There was, according to his testimony, not only the -- - the phenylacetic acid but there was also amphetamine and methamphetamine, plus a lot of glassware that couldn't be sniffed for or smelled and a lot of money that couldn't be sniffed for or smelled. So it's obvious that they were correct in this case, just like on the other cases the dog worked in.

I would specifically hold again that there was no search when the dog was taken out. The 5th Circuit doesn't need any help on citations. They always say this is the umpteenth time we have had to say this.

As to the probable cause, I address that as a separate issue. And it's clear that under the officer's testimony, that he did have facts and circumstances, and reasonably trustworthy information sufficient for him to believe that an offense had been committed. That is, that a trained dog was reacting positively and that he himself smelled the drug odor. And I think that is sufficient under the 5th Circuit cases.

I reject, as I've already done, the Defendant's argument that the dog was unreliable or improperly trained, or that dogs can on occasion react to things which are not drugs. You know, accepting all of that, I have a dog who's right 90 percent of the time and who was right on this occasion.

It also is an argument that if I accepted the phenylacetic acid argument made by the Defendant, I would really be reaching a conclusion that there would never be probable cause to search for amphetamine or methamphetamine because of odor, whether it's Mrs. Tapp running the warehouse, or whether it's a trained dog or a trained police officer.

And then I do agree with the Government's primary point, and that's under *United States vs. Craig*, 861 F.2d 818, if a law-enforcement official acting in objectively reasonably good faith relies upon a search warrant, then that evidence is admissible at trial even if the Defendant establishes that there was no probable cause. And I have an officer who was credible, who explained logically the conflict between the informant's statements and his, who obviously

has a lot of experience. And I have no doubt looking at him testify that he had a reasonable good faith in believing that that search warrant was legal.

Finally, the argument about the conflict in testimony, the Government is correct what we're really arguing about there is something that is not material or relevant. Whatever the statement Mrs. Tapp made or didn't make concerning odor coming from the particular unit, the bottom line is that she gave consent and does not deny that.

On the Motion to Quash the Indictment, I would deny that also. The Indictment does charge the Defendant with knowing and intentional possession of a prohibited chemical with the intent to manufacture amphetamine. And any argument that that's defective because not all of the elements required to produce or manufacture amphetamine or methamphetamine were in the warehouse, is an argument that needs to be made to the jury. It's not an argument that raises any legal deficiency in the Indictment.

I'll just rule on the other motions subsequently that are pending. I think those are the major motions.

MR. BLASSINGAME: Your Honor, I had a motion for demonstration by the dog.

THE COURT: I'm going to deny the Motion for Demonstration. I don't think there has been any reason shown that would justify that motion. I do need, however, to give you a chance to offer those depositions. It just dawned on me before we close, the deposition of Mrs. Tapp. And that's in the Motion to Suppress, so that will be considered as part of the record of this hearing. And the officer's deposition is also part of that motion and so that

would be considered part of this hearing also for appeal purposes.

MR. BLASSINGAME: Your Honor, we had one other motion for selective prosecution. We believe it was filed in Federal Court instead of State Court because of the time element and we'd ask the Court to send it down to the -- send it down to the State Court.

THE COURT: And I will overrule the Motion for Selective Prosecution. I don't see any basis for that. Even if the cases are brought up here because Defendants may be facing a more strict sentence under the guidelines, it's still the Government's prerogative of prosecuting people under.

Anything else?

AFFIDAVIT FOR SEARCH AND ARREST WARRANT

THE STATE OF TEXAS 900490

COUNTY OF DALLAS

The undersigned Affiant, being a Peace Officer under the laws of Texas and being duly sworn, on oath makes the following statements and accusations:

1. There is in Dallas County, Texas, a suspected place and premises described and located as follows: A single storage unit having two external roll-up doors one numbered 438 and the other 439 in the facility known as Lock and Key Mini-Storage at 3210 S. Buckner Boulevard in the City of Dallas, Dallas County, Texas.

2. There is at said suspected place and premises personal property concealed and kept in violation of the laws of Texas and described as follows: A controlled substance, to-wit: Methamphetamine or Amphetamine.

3. Said suspected place and premises are in charge of and controlled by each of the following persons: Karl Briceland McCurdy a white male DOB 10/16/48, Texas D.L. # 08359159 who is about 5' 11" 160 Lbs. having brown hair and eyes.

4. It is the belief of Affiant, and he hereby charges and accuses, that: On June 4th, 1990 Karl Briceland McCurdy as described above was in possession of a controlled substance, to-wit: METHAMPHETAMINE AND/OR AMPHETAMINE inside of the above described unit.

5. Affiant has probable cause for said belief by reason of the following facts: I, the affiant, J.E. Wright #2851 am a Dallas Police Officer currently assigned to the Special Operations Division, Canine Section.

I, the Affiant, received information on the 4th day of June, 1990 from a reliable confidential informant, that there was a strong odor consistent with that of METHAMPHETAMINE and/or AMPHETAMINE coming from the above described unit located at 3210 S. Buckner Boulevard, in the City of Dallas, Dallas County, Texas. Affiant, J.E. Wright walked canine #61 in the area of numerous units at the location and canine #61 gave a positive alert on the single unit having two external doors one of which was numbered 438 and the other numbered 439 for the presence of a controlled substance. Affiant, could also detect the smell of METHAMPHETAMINE and/or AMPHETAMINE coming from inside the above described unit at the above described location. Affiant, is familiar with the smell of METHAMPHETAMINE and/or AMPHETAMINE and has been present during numerous seizures of same and seizures of clandestine laboratories and finds that the smell coming from inside the above described unit is consistent with that smell.

Canine #61 is a trained Narcotics detection dog and has been trained to detect the odors of Controlled Substances to-wit: METHAMPHETAMINE, AMPHETAMINE, COCAINE, HEROIN, MARIHUANA, and/or XTC and has been trained to alert on this presence by biting, scratching, and barking at the object containing the substance. I, the Affiant, have been trained to recognize any alert by canine #61.

I, the Affiant, J.E. Wright #2851, believe that the single unit was described above contains a Controlled Substance, to-wit: METHAMPHETAMINE and/or AMPHETAMINE because

Affiant observed canine #61 give a positive alert on this unit and Affiant smelled the odor of METHAMPHETAMINE and/or AMPHETAMINE coming from inside the .above described unit.

Wherefore, Affiant asks for issuance of a warrant that will authorize him to search said suspected place and premises for said personal property and seize the same and to arrest each said described and accused person.

/s/ J.E. Wright
AFFIANT

Subscribed and sworn to before me by said Affiant on this the 5th day of June, 1990:

/s/ illegible
MAGISTRATE, DALLAS COUNTY, TEXAS

## SEARCH AND ARREST WARRANT

THE STATE OF TEXAS [A Single Mini-Warehouse Unit
[Numbered 438 and 439
[Located at 3210 S. Buckner Boulevard
COUNTY OF DALLAS [City of Dallas, Dallas County, Texas.

THE STATE OF TEXAS to the Sheriff or any Peace Officer of Dallas County, Texas, or any Peace Officer of the State of Texas,

GREETINGS:

WHEREAS, the Affiant whose signature is affixed to the Affidavit appearing on the reverse hereof is a Peace Officer under the laws of Texas and did heretofore this day subscribe and swear to said Affidavit before me (which said affidavit is by this reference incorporated herein for all purposes), and whereas I find that the verified facts stated by the Affiant in said Affidavit show that Affiant has probable cause for the belief he expresses therein and establishes the existence of proper grounds for the issuance of this warrant:

NOW, THEREFORE, you are commanded to enter the suspected place and premises described in said Affidavit and to there search for the personal property described in said Affidavit and to seize the same and bring it before me. And, you are commanded to arrest and bring before me each person described and accused in said Affidavit. Herein fail not, but have you then and there this Warrant within three days, exclusive of the day of its Issuance and exclusive of the day of its execution with your return thereon, showing how you have executed the same.

ISSUED AT 3:12 o'clock P.M., on this the 5th day of June, 19 90 to certify which witness my hand this day.

/s/ illegible
MAGISTRATE, DALLAS COUNTY, TEXAS

RETURN AND INVENTORY

THE STATE OF TEXAS

COUNTY OF DALLAS

The undersigned Affiant, being a Peace Officer under the laws of Texas and being duly sworn, on oath certifies that the foregoing Warrant came to hand on the day it was issued and that it was executed on the 5th day of June, 19 90, by making the search directed therein and seizing during such search the following described personal property:

See Attachment A

/s/ James E. Wright
AFFIANT

SUBSCRIBED AND SWORN to before me, the undersigned authority, on this the 11th day of June, 19 90.

/s/ illegible
Notary Public in and for Dallas County, Texas

ATTACHMENT A:

NO ARREST

SEIZED $99,950.00 U.S. CURRANCEY

( DRUG EVIDENCE SEIZED )

| | |
|---|---|
| 4 | 1 GALLON JUGS OF METH OIL |
| 14 | ASSORTED GLASS JARS CONTAINING METH OIL |
| 2 | PLASTIC BAGGIES CONTAINING WHITE POWDER |
| 4 | TEST TUBES CONTAINING METH OIL |
| 1 | MASON JAR CONTAINING POWDERY SUBSTANCE |
| 1 | JAR CONTAINING CHARCOAL FILTER MATERIAL WITH RESIDUE |

( CHEMICALS SEIZED )

| | |
|---|---|
| 3.75 | GALLONS MONO-METHYLAMINE |
| 8 | GALLONS METHYLAMINE |
| 3 | GALLONS METHANOL |
| 1 | GALLON METHYL ALCOHOL |
| 1 | GALLON CHLOROFORM |

| | |
|---|---|
| 3 | CYLINDERS HYDROGEN CHLORIDE GAS |
| 2 | LBS AMMONIUM CHLORIDE |
| 1 | PINT PHENOL LIQUEFIED |
| 5 | EMPTY GALLON CONTAINERS OF METHANOL |
| 468.5 | LBS PHENOL ACETIC ACID |
| 530 | LBS SODIUM ACETATE-ANHYDROUS |
| 5 | LBS MERCURIC CHLORIDE |

( OTHER PROPERTY SEIZED )

| | |
|---|---|
| 1 | BRIEF CASE CONTAINING DOCUMENTATION |
| 66 | CARDBOARD BOXES OF ASSORTED SIZES CONTAINING ASSORTED LABORATORY EQUIPMENT INCLUDING GLASSWARE, HOSES, TUBING, CLAMPS STANDS, BEAKERS, CONNECTORS, HEATING MANTLES, |

## APPENDIX C

### FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## APPENDIX D

21 U.S.C.A. § 802(34)(H) (West Supp. 1991)

**§ 802. Definitions**

As used in this subchapter:

(34) The term "listed precursor chemical" means a chemical specified by regulation of the Attorney General as a chemical that is used in manufacturing a controlled substance in violation of this title and is critical to the creation of the controlled substances, and such term includes (until otherwise specified by regulation of the Attorney General, as considered appropriate by the Attorney General or upon petition to the Attorney General by any person) the following

(H) Phenylacetic acid and its salts.

## APPENDIX E

21 U.S.C.A. § 841(d)(1) (West Supp. 1991)

**§ 841. Prohibited acts A**

Offenses involving listed chemicals

(d) Any person who knowingly or intentionally --

(1) possesses a listed chemical with intent to manufacture a controlled substance except as authorized by this subchapter;

shall be fined in accordance with Title 18, or imprisoned not more than 10 years, or both.